Filed 7/13/10 Law Offices of Gilbert & Marlowe v. Kurtz CA4/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| LAW OFFICES OF GILBERT & MARLOWE,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>SALLY FRANCES KURTZ,<br><br>Defendant and Respondent. | G042613<br><br>(Super. Ct. Nos. 07CL03243 and 30-2008-00107337)<br><br>O P I N I O N |
| RICHARD C. GILBERT et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>SALLY FRANCES KURTZ,<br><br>Defendant and Respondent. | |

Appeal from a judgment of the Superior Court of Orange County, Corey S. Cramin, Judge. Affirmed.

Law Offices of Gilbert & Marlowe and Richard C. Gilbert for Plaintiff and Appellant and Plaintiffs and Appellants.

Rynn & Janowsky, Elise C. O'Brien and Lewis P. Janowsky for Defendant and Respondent.

* * *

In this case we affirm a money judgment based on an employment contract between an associate attorney and her law firm, the gravamen of which was that the law firm would pay the associate a commission of 50 percent of "any new business income received" by the firm attributable to the associate independent of the firm's advertising. We affirm because the judgment is limited to awarding the associate half of all "new business income" received during the associate's tenure with the firm, or income received from a client who specifically agreed to the 50 percent commission arrangement after the attorney was fired.

However, before we can explain why we affirm the judgment, we must, because it involves this court's jurisdiction to consider this appeal in the first place, go into some considerable detail concerning the question of appealability. In the process of dealing with appealability, we will also set forth most of the basic facts and history of the case.

## I. *Appealability*

### A. Prejudgment Events

As noted, this appeal centers on an employment contract between an associate attorney and her law firm. The contract, between the employer, the Law Offices of Gilbert & Marlowe (from now on, "Gilbert & Marlowe" or "the firm of Gilbert & Marlowe"), and the employee, Sally Kurtz, provided that Kurtz would receive a salary of $60,000 a year, plus commissions of 50 percent of "any new business income received that is attributed to Sally Kurtz independent of Gilbert & Marlowe advertising." The contract also provided that: "The 50% of money actually received attributed to Sally Kurtz shall be paid the same day the money is actually received."

While the contract had a provision providing for the deduction of any referral fees that Kurtz herself paid to bring in a client, it was silent on the question of how to handle money paid by clients for *costs*, e.g., things like filing fees. The relevant portion of the contract is quoted verbatim in the margin.[1]

It was the omission concerning costs that first led to this litigation. Kurtz brought in a number of new clients. And when those clients paid any money at all to the firm, Kurtz would, as Diane Marlowe would later testify, "submit a piece of paper" to Marlowe "that said this is the amount of the payment from the client, this is what I'm entitled to receive." So, as Richard Gilbert would later testify, when a client would pay a retainer of, say, $1,500, Kurtz would submit a request for half of that $1,500 (i.e., $750) but not deduct from the amount any portion of the retainer earmarked for costs.

According to the later testimony of Diane Marlowe, when, in late 2006, the firm received "a number of complaints" about the quality of Kurtz's work, Marlowe started looking more carefully into the payment requests from Kurtz, and discovered the firm was paying for costs. As Marlowe put it, "this was overhead and so I realized that she was being overpaid." In December 2006, Gilbert & Marlowe fired Kurtz, and told Kurtz she could "take her clients with her." According to pleadings later filed by Gilbert & Marlowe, the amount of money paid over to Kurtz as a result of the practice of simply paying half the money actually received without first deducting costs was $1,745.96.

Not all the clients went with Kurtz, however. Kurtz interpreted the employment contract to obligate Gilbert & Marlowe to *continue* to pay to her half of all money the firm "actually received" from the clients she had brought in. Gilbert & Marlowe, by contrast, took the position that the firm was not obligated to pay Kurtz half

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[1] Here is the salary paragraph of the "Contract For Full Time Attorney Position" in its entirety:

"1. Salary. Commencing October 4, 2004, Gilbert & Marlowe shall pay to Sally Kurtz an annual salary of $60,000 per year plus 50% of any new business income received that is attributed to Sally Kurtz independent of Gilbert & Marlowe advertising. The base salary shall be paid on the 15th, and last day of each month in equal installments. The 50% of money actually received attributed to Sally Kurtz shall be paid the same day the money is actually received. If the client does not pay with cash, the 50% shall be paid the same day the bank confirms receipt of the money. If Sally Kurtz pays a referral fee to a third party, the referral fee shall first be deducted from the gross receipts, and 50% of the balance shall be paid to Sally Kurtz."

The contract was on Gilbert & Marlowe letterhead.

of money received for work which Kurtz never did, including work performed by other attorneys in the firm prior to Kurtz's firing. Kurtz would claim around $30,000 for these unpaid "commissions," plus incidental sums related to benefits which Kurtz claimed were owed but not paid at the time she was terminated.

Kurtz fired the first shot in February 2007, with a complaint to the Labor Commissioner of the State of California for her claimed unpaid commissions and incidental benefits. About three months later, in May 2007, the firm of Gilbert & Marlowe filed a complaint in Orange County for damages, the focus of which was that Kurtz had "billed" Gilbert & Marlowe for "services never provided."

The Labor Commissioner case was heard in January 2008. A decision came out in mid-May 2008. The Labor Commissioner awarded Kurtz about $26,000 in unpaid commissions, plus lesser amounts in waiting time penalties, interest, and unpaid health insurance reimbursement.

By the end of May 2008, the firm of Gilbert & Marlowe filed a "notice of appeal on" the Labor Commissioner's decision. At the same time the firm also filed a declaration of related cases, apparently seeking to consolidate its appeal from the Labor Commissioner's award with its own complaint for damages against Kurtz. About four months later, in September 2008, the trial court consolidated the two matters for all purposes -- hence the double caption in this appeal.

The consolidated action was tried in January 2009, in a court trial with Judge Corey S. Cramin presiding. The Labor Commissioner's decision had not explicitly mentioned Gilbert & Marlowe's claim that Kurtz had improperly billed the firm for money that included costs.[2] The matter was mentioned, however, at the trial in January 2009. Richard Gilbert, while testifying, took the position that Kurtz's requests for payment of money that included costs was "a felony crime."

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[2] The closest it comes is to recite: "Defendants also argue that any commissions owed to Plaintiff must be offset by the monies that they claim she owes her [*sic*] as embodied in the superior court action. No such offsets are permitted as a matter of law against wages owed for any debt claimed to be as (*Barnhill v. Saunders* (1981) 125 Cal.App.3d 1) [*sic*]. Therefore, the failure to pay any of the origination fees based on an offset is unlawful."

As it turned out, Gilbert & Marlowe *prevailed* on the cost issue with Judge Cramin. That is, the firm prevailed on the point that the employment contract did not allow Kurtz to claim half of money actually received that was otherwise designated for costs. But, as mentioned, no more than $1,800 of the money that found its way to Kurtz was for costs.

Gilbert & Marlowe also prevailed on the question of whether Kurtz could, consistent with Rule 2-200 of the Rules of Professional Conduct, collect commissions on fees incurred after Kurtz's firing when there was no written client consent to the commission arrangement.

But Kurtz prevailed on two, more monetarily significant, points: (1) Whether she was owed commissions on fees incurred prior to her firing on cases on which she did no work, and (2) whether she was owed a commission on fees incurred after her firing when the client subsequently consented to the fee splitting arrangement, in particular the client Kurt Eberhart, who paid Gilbert & Marlowe about $13,000 after Kurtz's termination.

In light of the fact that Kurtz didn't get all she asked for, Judge Cramin asked for posttrial briefing from the evidence produced at trial in order to ascertain what Kurtz's correct unpaid wages would be if they did not include commissions on costs paid or commissions on post-firing fees where there was no client consent.

In late March 2009, the court issued a minute order awarding Kurtz $22,919.13 for unpaid wages (i.e., commissions), $1,380.19 in unpaid vacation, $100 in unpaid medical premiums, plus $12,453.16 in waiting time penalties, interest of $1,663.86, and attorney fees and costs under the Labor Code.

A judgment would not be filed, however, until June 15, 2009. The delay was occasioned, at least in part, by a detour in May 2009 when the case was technically *reassigned* to Judge Francisco Firmat, and the firm of Gilbert & Marlowe attempted to disqualify Judge Firmat, then later withdrew its attempt to disqualify him.

A word on the reassignment is in order at this point in the narrative, because it helps explain some of the confusion about the judgment that would later follow, and indeed, complicate this appeal.

The case had already been tried. Judge Cramin had made his decision and expressed it in a minute order in March. Only the signing and filing of a formal judgment and postjudgment matters, like motions for new trial or attorney fees, remained, and these matters would necessarily *have* to be handled by Judge Cramin if he was at all available. (See *Abbott v. Mandiola* (1999) 70 Cal.App.4th 676, 677-678 ["Certain pairs of proceedings *must* be heard by the same judge if he or she is able to do so: for example, trials and new trial motions."].)

And, as it turned out, it was Judge Cramin who would ultimately sign the judgment and handle the postjudgment matters. Indeed, the only substantive effect of the reassignment to Judge Firmat was to force him to fend off a challenge to his impartiality. (The challenge to Judge Firmat was withdrawn in light of a declaration that he was not biased against the firm of Gilbert & Marlowe.)

But the formal reassignment also had this logistical effect: Because Judge Firmat was sitting in the Central Justice Center but Judge Cramin was being transferred to an outlying courthouse (the Laguna Hills Justice Center), the parties suddenly had the problem of figuring out which court should receive their filings, with the concomitant problem of structuring proofs of service. Thus a number of documents related to postjudgment matters were filed in the Central Justice Center in Santa Ana, ostensibly for Judge Firmat's signature now that he was formally reassigned to the case. But these documents ended up being sent to Judge Cramin in the Laguna Hills center, because he was the proper judge to handle those postjudgment matters.

Which brings us to the story of the judgment. The judgment in this case was signed, as it should have been (all else being equal), by the judge who heard the case -- Judge Cramin. The judgment he signed was *filed* on June 15, 2009. But the document was originally prepared by Kurtz's attorneys for Judge Firmat's signature, and brought to the Central Justice Center on June 9, where it was marked "received."

The judgment in the clerk's transcript thus shows what was originally a proposed judgment prepared for Judge Firmat's signature, with interlineations made by Judge Cramin and signed by Judge Cramin. Specifically, Judge Cramin, on June 15, lined out the word "proposed," and interlineated words showing a different court location -- from "Central" to "Laguna Hills Justice Center-Newport Beach." Judge Cramin further lined out Judge Firmat's name, and replaced it with his own, and signed the judgment. The judgment in the clerk's transcript thus has a "received" stamp from the Central Justice Center dated June 9, 2009, but a "filed" stamp from the Laguna Hills Center showing a June 15, 2009 filing date.

The June 15, 2009 judgment tracked the minute order. It provided that Gilbert & Marlowe was to recover nothing against Kurtz by way of its action against Kurtz, but that Kurtz was to recover $22,913.13 in unpaid wages, $1,380.19 in unpaid vacation pay, $100 in unpaid medical premiums, $12,453.16 in waiting time penalties, and prejudgment interest of $1,663.86. The June 15, 2009 judgment also left the following items for future calculation: Kurtz's costs, which were to "be determined in a memorandum of costs," postjudgment interest, and Kurtz's attorneys' fees and costs pursuant to the relevant Labor Code section.

B. Postjudgment Events

There is, in the clerk's transcript, a "notice of entry of judgment" filed July 9, 2009. This document includes a two-page notice to the effect that "on June 15, 2009, the Superior Court of California, County of Orange, per Judge Corey S. Cramin issued a Judgment in the above-captioned actions. *A true copy of the Judgment is attached hereto as Exhibit A* and incorporated by reference hereto." (Italics added.) And, indeed, we find in the clerk's transcript a copy of the June 15 judgment, as described above (i.e., having been interlineated by Judge Cramin), with the two clerk's stamps, one for the date of filing and one for the date the document was received by the Central Justice Center.

Attached to the notice of entry of judgment is a proof of service. This document recites that Tia Wilson of 4100 Newport Place Drive, Suite 700, Newport Beach, California -- which is the same address as Kurtz's attorneys (both trial and

appellate) -- on July 9, 2009, *personally served* the Notice of Entry of Judgment on Richard C. Gilbert and Diane J. Marlowe at their business address, the Law Offices of Gilbert & Marlowe, 950 West Seventeenth Street, Suites D & E, Santa Ana, California.[3]

More specifically, Tia Wilson declared under penalty of perjury that on *July 9*, 2009, she "personally delivered the documents to the persons at the addresses listed in item 4. For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office."[4]

That very day -- July 9 -- at 3:35 p.m., a legal secretary at Gilbert & Marlowe faxed a notice to Kurtz's attorneys, telling them that the very next day -- July 10 -- Gilbert & Marlowe would seek an ex parte order staying the "Enforcement of the Judgment in this case."

And, true to the promise of the fax, on July 10, Gilbert & Marlowe filed an "ex parte application for stay of enforcement of judgment,"[5] in which the firm announced its intention to "seek a Motion to Vacate the Judgment and a Motion for New Trial" based on the inherent legal wrongfulness of the judgment, i.e., that Kurtz had "admitted in testimony to embezzling client monies for costs."

Accompanying the ex parte application, and also filed July 10, 2010, was a formal motion for an order to "stay enforcement of judgment," also attacking the judgment on the merits.

The ex parte matter wasn't heard July 13, 2009, though. At the hearing the parties stipulated to stay the enforcement of the judgment until a hearing on a "motion to vacate" scheduled for August 6, 2009.

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[3] Paragraph indentations in the quoted material omitted.

[4] In item 4 of the form proof of service, there is a parenthetical: "*(specify name, address, fax/email if applicable, and time of service if personally served)*." The proof of service does *not*, however, give the time of the personal service. That point, however, is immaterial assuming the document really was served on Gilbert & Marlowe's office *sometime* on July 9 (and most likely, as we are about to show, before 3:35 p.m.).

[5] All quotations of document titles have been changed from upper case to normal capitalization.

On July 29, Gilbert & Marlowe filed a formal motion to vacate the "judgment filed June 15, 2009."

The motion to vacate or for a new trial was taken under submission by Judge Cramin on August 13, 2009. (The hearing coincided with Kurtz's motion for attorneys' fees actually filed before the judgment.) The next day, August 14, Judge Cramin denied the motion for a new trial, denied the request to stay enforcement of judgment, and awarded Kurtz about $39,000 in attorney fees plus about $1,300 in costs.

Four days later, August 18, an "amended judgment after bench trial" was filed. It had a "received" stamp from the Central Justice Court (received on July 30), and a "filed" stamp from the Harbor Justice Center Laguna Hills Facility, saying "filed" on August 18.

This "amended" judgment was identical to the June 15 judgment, except that where the June 15, 2009 judgment had language anticipating numbers to be determined in future proceedings, the August 18, 2009 filled in those numbers. Thus it provided for $440 in costs, and $38,700 in attorney fees[6] and $1,326.35 in costs pursuant to the Labor Code. The document was signed by Judge Cramin.

A notice of entry of amended judgment was filed August 25, 2009. Its proof of service recited that Tia Wilson personally served the document at Gilbert & Marlowe's Seventeenth Street office the previous day, i.e., August 24.

On September 8, 2009, Gilbert & Marlowe filed a notice of appeal "from the Amended Judgment entered August 18, 2009, by Judge Corey S. Cramin.[7]

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[6] The original document apparently submitted on July 30 proposed attorney fees of $42,597.50, but Judge Cramin interlineated the $38,700 figure.

[7] There are, in fact, two notices of appeal in the clerk's transcript -- one filed August 28, 2009 and one filed September 8, 2009. It appears the explanation is that on September 2, the Superior Court clerk in the Central court sent the firm a notice of default in cases of "Limited Civil Appeals" saying there had been a failure to pay the filing fee. So, on September 8, along with another notice of appeal Gilbert & Marlowe also filed a form for "Limited Civil Case" formally abandoning their first appeal. It is the September 8, 2009 notice of appeal that the firm has attached as Exhibit "I" to its letter brief of October 5, 2009.

C. Postnotice of Appeal Events

On September 30, 2009 (well before the opening brief would be filed in mid-February 2010), this court, on its own motion, requested the parties to address the question of whether the appeal was timely filed because it purports to be from an "amended" judgment. The order cited *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222 (*Torres*), about which more anon.

The response of Gilbert & Marlowe was this: The firm filed a letter brief dated October 5, 2009 asserting that, on July 9, 2009, "Appellants received a new version of the **[Proposed]** Judgment After Bench Trial which the Court marked 'received' stamped on June 9, 2009. Appellants never received a FILED copy of this said proposed Judgment which had been signed by the Court. [*Exhibit -C*]." (Original emphases.)

The document marked Exhibit C in Gilbert & Marlowe's October 5 letter brief is a copy of the proposed judgment after bench trial marked received *June* 9 by the Central Justice Court. The proposed judgment had Judge *Firmat's* name on the signature line. The document is identical to the June 15 filed judgment, except it has none of interlineations we have described above: The document is obviously the document that went to the Central Court and *was marked "received" by that court on June 9*, and *not* the document that emerged from Judge Cramin's chambers on June 15.

Exhibit C to Gilbert & Marlowe's letter brief also has a proof of service. That proof of service says that on *June* 9 -- again, June 9, not July 9, -- Tia Wilson personally served Gilbert & Marlowe with a *proposed* judgment after bench trial.

Gilbert & Marlowe's October 5 letter brief also asserts that the firm only "discovered that the proposed Judgment received by Appellants and by the Court on June 9, had, in fact, been filed on *July* 15, 2009. [*Sic*.] To date, Appellants have never received a FILED copy of this Judgment which had been signed by the Court." (Italics added.)

The letter brief does not say exactly *when* the firm "discovered" that the judgment had been filed "July 15," and of course it hadn't been filed *July* 15 -- it was filed *June* 15.

In its reply brief, Gilbert & Marlowe elaborate on its non-receipt of the judgment. We quote: "Further, Appellants never received the Judgment filed on June 15, 2009, until Respondent's counsel filed Respondent's Letter Brief on or about October 7, 2009, in response to Justice Sills order and placed as Exhibit A the Judgment filed June 15, 2009, which in fact, is amended in several material places." (Rep. Br. at pp. 1-2.)

Exactly why Gilbert & Marlowe knew, at least as of late July -- as shown by their July 29 formal motion to vacate the "judgment filed June 15, 2009" -- that the judgment was indeed *filed* June 15 when the firm supposedly had only been served with a proposed judgment marked "received" on June 9 is a question not addressed in any of the firm's briefs filed with this court.

The October 5 letter brief also took the position that: "The attorney fees awarded in the amount of $38,700 plus costs in the amount of $1,326.35 materially changed the Judgment. No attorney fees had previously been awarded."

Kurtz's letter brief, dated October 7 and filed October 9, 2009, met Gilbert & Marlowe's assertion that the firm had never been served with the judgment (presumably the June 15 judgment) signed by Judge Cramin by pointing to the proof of service as demonstrating otherwise. We have described that proof of service in great detail above.

This court then issued an order saying (a) the appeal could "go forward" but (b) the question of the "scope" of the appeal would be considered by the panel ultimately considering the case. Having considered that scope, we now explain why this appeal *does* include issues relating to the original judgment filed June 15, and why *Torres* does not require a different result.

D. Analysis of Appealability and Scope of Appeal

In *Torres*, a group of retirement board members sued the city whose employee retirement board they sat on for defense and indemnification of a suit they were the objects of brought by the city attorney. (The relationship of the parties in *Torres* was

thus rather incestuous -- basically the City of San Diego was suing itself from three different directions.)

The board members got a judgment in their favor, via a summary judgment motion, with that judgment being entered on March 6, 2006. The city filed a notice of appeal the following May 10. (*Torres, supra*, 154 Cal.App.4th at p. 220.) In doing so, the city blew the deadline to appeal, and the appellate court dismissed the appeal as untimely on June 1. (*Ibid*.)

The winning board members moved for attorney fees, and the trial court issued an order granting the request. This time, the city timely appealed from the adverse order. (*Torres, supra*, 154 Cal.App.4th at p. 221.) But in its timely appeal, the city purported to raise issues "pertaining to the summary judgment," and that attempt simply would not work. The appellate court noted that "'[w]here the judgment is modified merely to add costs, attorney fees and interest, the original judgment is not substantially changed and the time to appeal it is therefore not affected.'" (*Torres*, *supra*, 154 Cal.App.4th at p. 222, quoting Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2006) ¶ 3:56:3, p. 3-26.) Accordingly, the *Torres* court lacked "jurisdiction to consider any aspect of the summary judgment ruling." (*Torres, supra*, 154 Cal.App.4th at p. 222.)

In the case before us the analysis contrasts with *Torres* this way:

The original judgment here was filed June 15, 2009. Notice of entry of that judgment *was* served July 9, 2009, including a copy of the *filed* June 15 judgment.

We will charitably assume, with regard to Gilbert & Marlowe's October 5 letter brief and the somewhat strange statement in its reply brief, that the filed copy of the June 15 judgment somehow got detached from the notice of entry of judgment, and then got lost in some shuffle at Gilbert & Marlowe's offices. (The firm's immediate faxed reaction of 3:35 p.m. on July 9, plus its filings on July 10 directed at the "filed" judgment, however, do tend to belie that charitable assumption, but we prefer to assume mere confusion and lost paperwork in Gilbert & Marlowe's office rather than a deliberate attempt to mislead this court. As noted, the dates are easily confused and the purported

transfer of the case from Judge Cramin to Judge Firmat only compounded the potential for confusion.)

The key event, for purposes of the timeliness of this appeal, was thus the service of notice of entry of judgment on July 9, 2009.[8]

Ironically, though, it is precisely the filings of July 10 -- the filings that belie Gilbert & Marlowe's claim that the firm never was served a "filed" copy of the June 15 judgment -- that "save" this appeal. As noted above, among those filings were the "ex parte application for stay of enforcement of judgment" which plainly announced an intention to "seek a Motion to Vacate the Judgment and a Motion for New Trial."

We may construe the ex parte application of July 10 to be a timely notice of motion to seek both new trial and vacation of the judgment. (See Code Civ. Proc. §§ 659, 663a.) And because Gilbert & Marlowe timely filed those notices, it served "valid" motions to vacate the judgment and for new trial, and, accordingly, the time to appeal was extended to 30 days after the clerk of the Superior Court mailed the order denying the motions. (Cal. Rules of Court, rules 8.108(b) [30-day extension when valid notice of intention to move for new trial] and 8.108(c) [30-day extension when valid notice of intention to move to vacate judgment].)

The minute order denying the motion for new trial was mailed by the Superior Court clerk on August 17. Thus, the time to appeal the original judgment was extended 30 days from August 17, and would thus easily encompass the notice of appeal filed September 8, 2009.

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[8] It is in this respect noteworthy that Gilbert & Marlowe's letter brief of October 5 does *not* assert that no notice of entry of judgment was ever served on the firm, only that the firm never got a file-stamped copy of the June 15, 2009 judgment. The relevant rule of the California Rules of Court, rule Rule 8.104, however, does not require service of a copy of the file-stamped judgment; service of a notice of entry of judgment will do. Note the italicized "or" in this sentence from rule 8.104(a):

"Unless a statute or rule 8.108 provides otherwise, a notice of appeal must be filed on or before the earliest of:

"(1) 60 days after the superior court clerk serves the party filing the notice of appeal with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either was served;

"(2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment *or* a file-stamped copy of the judgment, accompanied by proof of service; or

"(3) 180 days after entry of judgment." (Italics added.)

Does it make any difference that the *timely* notice of appeal was ostensibly only from the "amended" and not the original judgment?

This is an interesting question. While the language of rule 8.100[9] of the California Rules of Court requires notices of appeal to be "liberally construed" -- which would suggest it should make no difference -- the rule has language that "The notice is sufficient if it identifies *the particular judgment* or order being appealed from," (italics added), which just might justify looking *only* at the "particular judgment . . . being appealed from" in this case -- the amended judgment -- and thus restricting the scope of this appeal to the amended judgment.

*ECC Const., Inc. v. Oak Park Calabasas Homeowners Assn.* (2004) 122 Cal.App.4th 994 (*ECC Const.*) provides the answer: No. It makes no difference.

In *ECC Const., supra*, 122 Cal.App.4th at page 1003, footnote 5, the court reasoned that because an amended judgment merely changed the amount of damages (the trial court had granted a conditional new trial based on excessive damages unless the plaintiff consented to a reduction in damages, which the plaintiff did), the amended judgment did not "otherwise *alter the bases* for defendant's appeal." (*Ibid.*, italics added.) Hence, the defendant was "required to appeal from the original judgment, not wait for the amended judgment." (*Ibid*.) Even so, because "a notice of appeal is to be liberally construed in favor of its sufficiency" and "its sufficiency may be upheld if respondents have not been misled or prejudiced thereby," the appellate court construed a notice of appeal, ostensibly from the original judgment, to "include the amended judgment." (*Ibid*.)

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[9] Here is the language of Rule 8.100(a) in its entirety:

"(a) Notice of appeal

"(1) To appeal from a superior court judgment or an appealable order of a superior court, other than in a limited civil case, an appellant must serve and file a notice of appeal in that superior court. The appellant or the appellant's attorney must sign the notice.

"(2) *The notice of appeal must be liberally construed. The notice is sufficient if it identifies the particular judgment or order being appealed.* The notice need not specify the court to which the appeal is taken; the appeal will be treated as taken to the Court of Appeal for the district in which the superior court is located.

"(3) Failure to serve the notice of appeal neither prevents its filing nor affects its validity, but the appellant may be required to remedy the failure." (Italics added.)

Here, like *ECC Const.*, the amended judgment does not alter "the bases of the appeal." If the *ECC Const*. court could liberally construe the notice of appeal from the original judgment to include an amended judgment, we see no reason the rule of liberal construction -- at least when the notice of appeal from an amended judgment is still timely as to the original appeal -- should not work in reverse. Particularly so given that the "bases" for the appeal are necessarily grounded in the original judgment and the opposing party cannot claim to have been misled to her prejudice.

Here, it is clear that the notice of appeal from the "amended" judgment seeks to attack the merits of the original judgment filed June 15, 2009. Because the notice of appeal is timely as to the original judgment, we construe the notice of appeal, ostensibly limited to the amended judgment, to encompass the original judgment as well.

What about *Torres*? In *Torres*, the time had dispositively run on the opportunity to appeal from the original judgment. There was no hope of saving that appeal. Here, the time did not run. The notice of appeal filed September 8 easily encompasses the original judgment as well as the amended judgment. And, ironically again, no issues are raised as to any of the parts of the amended judgment which were genuinely new: The appeal is confined strictly to issues relating to the original judgment.

We now address the merits of the appeal. We take the issues in order of monetary importance.

## II. *Merits of the Appeal*

### A. The "Embezzlement" Issue

The primary leitmotiv of Gilbert & Marlowe's opening brief is straightforward: Kurtz "embezzled" from the firm's clients, ergo she cannot recover anything in this litigation. It is, stripped to its essentials, an argument for forfeiture of whatever money would otherwise be due Kurtz.

No attempt, however, is made in the opening brief to demonstrate how Kurtz's conduct -- basically, in submitting to the firm pieces of paper claiming half of money actually paid by clients she brought in -- constitutes embezzlement.

We must remember: Judgments are presumed correct (e.g., *Denham v. Sup. Ct.* (1970) 2 Cal.3d 557, 564) and all conflicts in the evidence and inferences therefrom are drawn in support of that judgment (e.g., *In re Christopher C.* (2010) 182 Cal.App.4th 73, 84).

It is Gilbert & Marlowe's burden to show error (*Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688, 709-710) [appellant's burden to show error]). That is, for Gilbert & Marlowe's embezzlement argument to prevail, the evidence must *compel* the conclusion that Kurtz committed embezzlement. (See *Le v. Pham* 180 Cal.App.4th 1201, 1206 [appellants were "necessarily in the position of saying that the evidence, *despite* all the resolution of conflicts and having all reasonable inferences drawn against them, nevertheless *compels* a judgment in their favor"].)

Here, the evidence most certainly does not *compel* a finding of embezzlement. One element of embezzlement is conspicuously missing -- fraudulent intent. (See *People v. Sisuphan* (2010) 181 Cal.App.4th 800, 813 ["Fraudulent intent is an essential element of embezzlement."].)

At most, what we have in this case is not embezzlement, but an unreasonable, albeit plausible, interpretation of an employment contract.

Two elements of the employment contract should be noted: First, Kurtz was entitled to payment of half of all money "actually received" the *very day* it came in. Second, the only *prior deduction specified* was not money to pay costs, but referral fees Kurtz herself was required to pay.

Obviously, then, neither party thought about client money for costs when the contract was made. If they had, costs would (along with the referral fees that were to be deducted) have been mentioned. For one thing, court filing fees are always going up, and more money may need to be allocated to those fees than either attorney or client anticipated, so proper accounting might not be possible until whoever did the filing got back from the clerk's window.

But beyond that, Kurtz could plausibly believe that it was Gilbert & Marlowe who would either (1) segregate money for costs immediately when it came in,

or (2) simply take any unsegregated money for costs out of the firm's half of money actually received. After all, the money had to be paid *first* to Gilbert & Marlowe before Kurtz could claim her half.

To be sure, the idea that the contract should be interpreted that way -- most favorably to Kurtz -- was rejected, and we think correctly so, by the trial court. The key words, "new business *income*" (italics added), do not naturally encompass income money paid for required costs because those costs do not add to anyone's wealth, they are simply required to litigate.

Even so, the trier of fact could reasonably conclude, particularly since it was Gilbert & Marlowe itself that was preparing the checks in response to Kurtz's claims, that Kurtz had no intent to defraud.

B. The Postfiring Fee Issue

As mentioned above, Judge Cramin decided two issues in favor of Gilbert & Marlowe: Whether Kurtz's claim for half of all money paid could include money for costs (answer: no), and whether Kurtz could obtain half of money paid for fees (as distinct from costs) by clients after Kurtz was fired (answer: no, again).

Because of these two decisions, Judge Cramin asked for posttrial briefing to calculate what Kurtz was owed. Kurtz's posttrial brief presented her claim for unpaid commissions, going client-by-client: First, the total amount received by that client was listed. Then Kurtz *deducted* money paid for costs, and then also deducted any referral fees paid by Kurtz. From the balance, Kurtz's half was calculated, and then from that half any amounts already paid to Kurtz were deducted, giving the total owed her for that client. The total of all the claims so calculated was $22,913.13, and that figure ultimately found its way into the judgment.

Three clients, in particular, should be mentioned now: Kurt Eberhart, Sivi Doornbus, and Yvette Roque. These three are significant because Kurtz initially claimed,

in an exhibit 25 submitted to the trial court setting forth her claims,[10] money received by these clients *after* she was fired. The trial court, however, only allowed money received from Kurt Eberhart after Kurtz was fired to count toward her total, because Eberhart had signed a consent form agreeing to the commission (or "fee-splitting") arrangement.

The reason for the exclusion of postfiring money paid by Doornbus and Roque is to be found in rule 2-200 of the California Rules of Professional Conduct (Rule 2-200). We set forth the entirety of rule 2-200 in the margin,[11] but the key language is this: A legal employer *can*, without any client consent, agree to split fees between itself and its employees (or, as the rule calls them, "associates"). Client consent, however, is required *after* the recipient of the fee-splitting arrangement leaves the firm. As noted, Eberhart did indeed agree in writing (in a letter dated October 3, 2008) to allow Gilbert & Marlowe to divide postfiring fees with Kurtz. Eberhart's consent is significant because the total amount of postfiring fees was relatively large (about $26,000 after she was fired).

Under *Mink v. Maccabee* (2004) 121 Cal.App.4th 835 (*Mink*), such a belated written consent nevertheless *complies* with rule 2-200. *Mink* reasoned that there was nothing in the *text* of the rule that requires the consent be given prior to the "fee-

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[10] Kurtz's motion to augment the record with Kurtz's counsel's copies of certain trial exhibits is granted. Gilbert & Marlowe's opposition attacks the merits of some of the exhibits (particularly exhibit 25), but there is no question that the exhibits were admitted at trial.

Of course, just because an exhibit was admitted does not mean its contents are true for purposes of appellate review. For example, the significance of exhibit 25 *for our purposes* here is not that we accept its claims as true, but it shows us what *claims* Kurtz was making.

[11] Here is the text:

"(A) A member shall not divide a fee for legal services with a lawyer *who is not a partner of, associate of, or shareholder with the member* unless:

"(1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

"(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200."

"(B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future." (Italics added.)

splitting arrangement," or indeed, to "any time other than prior to any division of fees." (*Mink, supra,* 121 Cal.App.4th at p. 838.)

Gilbert & Marlowe spend much of the firm's briefing inveighing against the rule of decision in *Mink*, but the argument is unpersuasive because the firm points to nothing in the *text* of rule 2-200 that requires a contrary result. In *Mink*, the appellate court simply followed the text of the rule, and we can hardly fault it for that.

Gilbert & Marlowe also tries to distinguish *Mink* on the theory that: "In *Mink*, the attorneys all did work on the case. Hence, it would be possible to make a Quantum Meruit argument." (App. Opn. br. at p. 12.)

However, the attempt to distinguish *Mink* is not persuasive. In *Mink*, an attorney (Maccabee) sued another attorney (Mink) for a *referral fee* (by way of a cross-complaint) and, to be sure, for quantum meruit, but the trial court threw the case out on demurrer because the client hadn't given consent to the division of fees until several months after the case referred had been completed. Moreover, the underlying case had indeed been quite profitable for the attorney to whom it had been referred, generating for him about $400,000 in compensation. (*Mink, supra,* 121 Cal.App.4th at p. 837, fn. 1.) The basis of the demurrer was the "belated acknowledgement and consent" of the client, and the first part of the opinion's published analysis -- the part dealing with belated acknowledgements -- was devoted solely to rule 2-200. (*Id*. at p. 837.)

The last three paragraphs of the published analysis approved the quantum meruit claim by simply noting that the Supreme Court had said (in *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453) that even if a lawyer could not, because of a total absence of consent, recover a fee-splitting arrangement *as a matter of contract*, the lawyer could still bring a claim in quantum meruit. (*Mink, supra,* 121 Cal.App.4th at pp. 838-839.) Against that point, the defendant had claimed on demurrer that the quantum meruit claim was nothing but a "'subterfuge to recover a prohibited referral fee,'" but that argument could not avail on demurrer, where the trial court is not allowed to make "any factual findings at all, including 'implicit' ones.'" (*Id*. at p. 839.)

It is thus a misreading of *Mink* to suggest that it does not squarely stand for the rule that belated consent can still satisfy rule 2-200. Nothing in the *Mink* court's analysis of the rule 2-200 issue was in any way grounded on the idea that the "attorneys did all the work" on the underlying case.

In sum, because the trial court did *not* allow Kurtz any recovery of (a) money that was actually paid for costs or (b) money paid after she left the firm not *otherwise consented to by the client*, it is clear that the basis of the $22,913.13 award for unpaid wages is correct.

C. Health Insurance Payments

Under the heading of "Failure to Consider All of the Evidence," and then again a page later under the heading, "Health Insurance," Gilbert & Marlowe asserts that the evidence *does* compel the conclusion that the firm paid all health insurance payments due to Kurtz. The basis of the assertion is a series of checks for that purpose from the firm to Kurtz. The checks were contained in a request for admission and totaled $2,600. Hence, Gilbert & Marlowe argue, the trial court's award of $100 for unpaid health insurance payments must be error.

A few more facts about the case must now be mentioned: Kurtz first began working for Gilbert & Marlowe at the beginning of October 2004 -- October 4, 2004 to be exact. She worked at Gilbert & Marlowe for six and one-half months, until April 18, 2005. Kurtz returned to work for the firm on June 7, 2005, and worked until her firing on December 12, 2006 to be exact. That is, when she was fired, she had worked about half of December 2006.

There is no dispute the contract required Gilbert & Marlowe to pay directly to Kurtz "$200.00 per month as a contribution toward health insurance."

The dispute boils down to the final check and the final half month of work. There is no question the *last* health insurance check was dated November 30, 2006. Nothing on the check suggests that it was issued *for the upcoming December*. Indeed, the last series of checks belies any possibility that the last check was issued for that December: Check 4176, dated August 7, 2006, has the notation on it, "Medical July."

Check 4347, dated September 29, 2006, has the notation on it, "Med Aug/Sept." Check 4509, dated October 31, 2006, only says "Med" on it, though it is a reasonable inference that it covered October. The same may be inferred about the very next check, the final one, check 4583, which again only says "Medical" on it. It clearly covered November. Thus, Kurtz's one-half month in December 2006 was not covered, and the trial judge correctly prorated that month into a $100 award.

D. Vacation Pay

Finally, Gilbert & Marlowe challenges the judgment to the extent that it awards Kurtz $1,380.19 for unpaid vacation otherwise due her. The firm asserts that the trial court had no evidence on which to predicate the award, representing six days of untaken vacation.

This argument is not developed in the opening brief, which fails to set forth all the evidence on the point, including an exhibit representing the office manager's notes of the vacation time taken by Kurtz (exhibit 12) as well as Kurtz's own testimony on the point. Therefore the issue has been waived. (See e.g., *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 212 ["We hold that plaintiff has waived the issue by his failure to fairly and completely set forth, discuss, and analyze the relevant facts under the applicable substantial evidence standard of review."]; *In re Marriage of Rothrock* (2008) 159 Cal.App.4th 223, 230 ["An appellant contending some particular finding is not supported must set forth in his or her brief a summary of the material evidence upon that issue, and, if that is not done, the error is waived."].)

E. Other Issues

1. *Points Not Properly Raised*

A point made somewhat obliquely in the opening brief (the context is the argument about the checks) is that the trial judge was unfair to Gilbert & Marlowe because he requested posttrial briefing on Kurtz's "issues but not permit [Gilbert & Marlowe] the same even-handed Due Process."

The argument is, however, not raised by a separate heading in the opening brief. We therefore deem it waived. (See Cal. Rules of Court, rule 8.204(a)(1)(B);

*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4 ["The failure to head an argument as required by California Rules of Court . . . constitutes a waiver."]; *Heavenly Valley Ski Resort v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1345, fn. 17 ["Each point in an appellate brief should appear under a separate heading, and we need not address contentions not properly briefed."].)

We should add here that points raised by separate headings in the *reply* brief, not otherwise first raised in the opening brief, have also all been waived. (See *Jameson v. Desta* (2009) 179 Cal.App.4th 672, 674, fn. 1 ["Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument . . . ."]; *In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 214 ["we need not consider new issues raised for the first time in a reply brief in the absence of good cause, and wife has not shown any"].)

Indeed, perhaps we have already been too indulgent to the appellant by dealing with the substance of the embezzlement argument, which itself is not so raised. (The main reason for dealing with the issue is that the text of the opening brief is so heavily studded with it.) That said, we may merely observe that Gilbert & Marlowe's complaints that the trial court was somehow unfair to the firm by requesting posttrial briefing are substantively unfounded. That briefing was only necessitated because the trial judge *sided with Gilbert & Marlowe* in regard to two key issues (deductions of costs and money received after firing when there was no written client consent). And in any event, both sides had equal opportunity to present their arguments and evidence in regard to the trial court's legally correct determination of what Gilbert & Marlowe owed Kurtz under the contract.

2. *An Unpleasant Matter*

In our discussion of appealability we indulged the firm of Gilbert & Marlowe with the assumption that -- despite clear indication that on July 10 it *knew* of the judgment *filed* on June 15 -- perhaps the firm really wasn't served with a file-stamped

copy of the June 15 judgment on July 9, despite what the proof of service said under penalty of perjury.

But now we must confront a matter that is even harder to overlook. On page 7 of the opening brief, Gilbert & Marlowe makes a statement, in the context of discussing rule 2-200, which we now quote verbatim, including the record reference: "The Trial Judge stated: 'Rules of Professional Conduct are beyond my ability to understand.' [ 1 RT 22:9-10]".

The clear impression intended from the statement is that the trial judge was somehow recognizing that rules of professional ethics were a specialized matter beyond his usual area of expertise. Thus, the sentence in the opening brief that is immediately before the "beyond my ability" quote is a claim that Kurtz was in violation of ethical rules: "Hence, Respondent's claim to an entitlement of money under the circumstances of this case violates Public Policy, The Rules of Professional Conduct, Rule 2-200."

By the same token, the sentence immediately after the "beyond my ability" quote is concerned with making the point that ethical rules preclude Kurtz's substantive claims for unpaid wages: "Absent the consent of Gilbert and Marlowe which was clearly understood at the time of termination, there could be no fee sharing agreement."

The impression that the trial judge was recognizing that the rules of ethics were beyond his usual ken is then strengthened by the next paragraph on page 7 of the brief, which juxtaposes the importance of ethical rules against normal operation of the Labor Code: "Respondent presents this case as if this case were a simple Labor Code case without any regard to the high Fiduciary Duties owed by Respondent to the clients and to Appellants."

However, as pointed out by Kurtz in her respondent's brief, the "beyond my ability to understand" statement is clearly misleading. The context shows something else indeed.

Trial began on the morning of January 26, 2009. At the beginning of the afternoon session that day, the trial court took up motions in limine. One of those motions was to exclude the expert testimony of Gilbert & Marlowe's expert witness,

Ellen R. Peck. The proceedings in regard to that motion are to be found at the bottom of page 21 of the Reporter's Transcript:

"The court: [finishes up explaining why it was denying Kurtz's other motion in limine]. [¶] Now, the other motion regarding the testimony of expert."

At this point, both Gilbert and Marlowe argued. Here are the next four paragraphs of transcript, verbatim:

"Mr. Gilbert: We have P's and A's, Your Honor.

"The court: What would you like to tell me?

"Ms. Marlowe: Yes, your honor. We had an opportunity to reach the expert, and she directed my attention to Evidence Code section 801(a) which, and I'm paraphrasing, expert testimony may be permitted to assist the trier of fact as to certain matters because *they are beyond the common experience of most lawyers and judges*.

"We contend that this area --" (Italics added.)

It was at this point that the trial judge made his "beyond my ability" comment, but the quotation in the opening brief is not an accurate reproduction: The court reporter -- who was able to hear the judge's intonation -- put a question mark at the end of his comment, to signify the judge's *skepticism* over the proposition that he needed an expert to assist him because professional rules were supposedly beyond his common experience. Here is the statement as it appears in the reporter's transcript, including the punctuation:

"The court: Rules of Professional Conduct are beyond my ability to understand?"

And all doubt about the judge's meaning is removed by the next two lines of transcript, in which the trial judge specifically *dispelled* the idea that the rule of ethics were "beyond" his "ability to understand":

"Ms. Marlowe: When it comes to the issue --

"The court: *I would hope not*." (Italics added.)[12]

Now, as noted, the misquotation in the opening brief was pointed out in the respondent's brief. The matter is wholly ignored in the reply brief, and the author of both the opening and reply briefs, Richard Gilbert, was present at trial when the "beyond my ability" comment was uttered.

There is, of course, a rich irony here. The brief, in which Gilbert & Marlowe make, as a centerpiece of its appeal, the Rules of Professional Conduct, itself misleadingly misquotes the trial judge to the Court of Appeal.

We would remind Gilbert & Marlowe that the California Rules of Professional Conduct about which the firm so enthuses in its briefs includes this one: "In presenting a matter to a tribunal, a member: [¶] (A) Shall employ, for the purpose of maintaining the causes confided to the member such means o*nly as are consistent with truth*; [¶] (B) *Shall not seek to mislead the judge*, judicial officer, or jury by an artifice or false statement of fact or law; (C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision . . . ." (Rule 5-200, italics added.)

Since the rule uses the word "tribunal," the rule against seeking not to mislead "the judge" necessarily includes not misleading appellate court panels.

Canon 3(D)(2) of the Code of Judicial Ethics states: "Whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action." (Cf. *In re Ringgold* (2006) 142 Cal.App.4th 1001, 1016.)

We deem as "appropriate corrective action" this admonition, which we make now directly to Gilbert & Marlowe: Do not misleadingly misquote trial judges in briefs to the Court of Appeal; the next time we will not be so lenient as to let the matter end with a simple admonishment.

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[12] The trial judge thus granted the motion in limine to the extent that it sought to "exclude any testimony from Judge Peck as to the application of law to the particular facts in this case or to give any expert opinion regarding questions of law. I don't want her testifying on any legal conclusion."

## III. DISPOSITION

The judgment is affirmed. Kurtz will recover her costs on appeal.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

ARONSON, J.